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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STEVEN ALLEN RICE; ANITA VIVIAN MILLER; CHERYL SAUBEN MIRANDA; ELLEN RICE WARD; BOBBIE RAY PRECKWINKLE; and LAVERNE SAUBEL NELSON,

Petitioners,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation; UNITED STATES OF AMERICA; 33.49 ACRES OF LAND IN THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA; et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

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STEVEN ALLEN RICE; ANITA VIVIAN MILLER; CHERYL SAUBEL MIRANDA; ELLEN RICE WARD; BOBBIE RAY PRECKWINKLE; and LAVERNE SAUBEL NELSON,

Petitioners,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation; UNITED STATES OF AMERICA; 33.49 ACRES OF LAND IN THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA; et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Rice, Miller, Miranda, Ward, Preckwinkle and Nelson respectfully petition this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for Ninth Circuit entered on August 26, 1982.

QUESTIONS PRESENTED

1. Are 25 U.S.C. §357 and 25 U.S.C. §§323-4 *alternative* means by which a party possessing the power of eminent domain may acquire a right of way for purposes of electrical transmission lines across lands allotted in trust to an Indian by the United States, or does the latter scheme from 1948 displace or implicitly repeal the former scheme from 1901 to the extent of overlap?

2. When proceeding under 25 U.S.C. §357, must a party possessing the power of eminent domain under California law allege in its complaint to condemn a right of way across allotted land held in trust for Indians by the United States that the condemnor's intended use of the land (1) is a more necessary public use, or (2) will not unreasonably interfere with or impair the continuance of the public use as it exists or may reasonably be expected to exist in the future as allotted Indian trust land?

3. Is the question of whether lands allotted to Indians and held in trust by the United States for such allottees a question of federal law or a question of state law? If a question of federal law, are the Indian allottees deprived of a substantive right afforded by federal law in violation of 28 U.S.C. §2072, the Rules Enabling Act, if the allegations described in Question No. 2 above are omitted from the condemnor's complaint?

4. Has California disabled itself, and all those acting under its authority, from taking advantage of 25 U.S.C. §357 by limiting by state statute the venue for all condemnation actions only to state superior court, rather than also to federal district court as this Court required in *Minnesota v. U.S.*, 305 U.S. 382 (1939)?

PARTIES

The parties to this proceeding are the six Indian allottees (Steven Allen Rice, Anita Vivian Miller, Cheryl Saubel Miranda, Ellen Rice Ward, Bobbie Ray Preckwinkle, and Laverne Saubel Nelson); the Southern California Edison Company (a corporation); the United States; approximately 33.49 acres of land located in the County of Riverside, State of California; Goodyear Service Stores; John H. Wingate, Jr., Timothy J. White; John R. Stotts, Jr.; Vernon H. Halbrook, d/b/a Wingate Air Conditioning Service; and unknown others.

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The opinion of the District Court is unreported and appears as Appendix A. The opinion of the Court of Appeals is as yet unreported and appears as Appendix B.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on August 26, 1982. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. The pivotal statute, 25 U.S.C. §357, Section 3 of the Indian Appropriations Act of March 3, 1901, 31 Stat. 1058, 1084, provides:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

2. The Act of February 5, 1948, 62 Stat. 17, the first six sections of which are codified as 25 U.S.C. §§323-8, provides:

> The Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.
>
> Sec. 2. No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984) as amended; the Act of May 1, 1936 (49 Stat. 1967), shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual

Indians may be granted without the consent of the individual Indians if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

Sec. 3. No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

Sec. 4. This Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed here-by.

Sec. 5. Rights-of-way for the use of the United States may be granted under this Act upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

Sec. 6. The Secretary of the Interior is hereby authorized to prescribe any necessary regulations for the purpose of administering the provisions of this Act.

Sec. 7. This Act shall not become operative until thirty days after its approval.

3. California Code of Civil Procedure §1240.510 provides that:

Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future. Where property is sought to be acquired pursuant to this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

4. California Code of Civil Procedure §1240.610 provides that:

> Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated. Where property is sought to be acquired pursuant to this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

5. California Code of Civil Procedure §1250.010 provides that:

> Except as otherwise provided in [certain sections not applicable here], all eminent domain proceedings shall be commenced and prosecuted in the superior court.

STATEMENT OF THE CASE

On September 25, 1979 plaintiff, the Southern California Edison Company (a public utility possessing the power of eminent domain under California law in order to carry out its functions under a prior certificate of public convenience and necessity, hereinafter referred to as "SCE") filed a complaint in eminent domain in the U.S. District Court for the Central District of California to condemn certain rights of way for purposes of electrical transmission lines across certain parcels of land included in the Agua Caliente Indian Reservation to the east of the City of Palm Springs, California, and allotted to petitioners Rice, Miller, Miranda, Ward, Preckwinkle, and Nelson (hereinafter, the "Indian allottees"). The said allotments were made pursuant to (1) the General Allotment Act of February 8, 1888 (25 U.S.C. §331 et seq., 24 Stat. 388); (2) the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712); (3) the Act of March 2, 1917 (39 Stat. 969); and the Agua Caliente Equalization Act of September 21, 1959 (25 U.S.C. §951 et seq., 73 Stat. 602) and were accomplished by the issuance of patents by the United States declaring that the United States would hold

the particular parcels in trust for "the sole use and benefit of" the respective allottee for at least 25 years from the date of issuance in 1961. SCE alleged jurisdiction only under 25 U.S.C. §357.

By way of defense, the Indian allottees asserted that SCE lacked the power to take rights of way across their allotted trust lands for the following reasons:

First, condemnation of rights of way is not available to SCE under 25 U.S.C. §357 because that subject is more specifically governed by 25 U.S.C. §§323-4.

Second, the complaint failed to state a claim on which relief could be granted because it lacked the allegations of more necessary public use or not incompatible public use required by California Code of Civil Procedure §§1240.610 and 1240.510, which allegations were required because the Indian allottees' allotted trust lands were already devoted to a public use or a public purpose.

Third, California has disabled itself, and all others acting under its authority, from taking advantage of 25 U.S.C. §357, even if that procedure were otherwise available, because California Code of Civil Procedure §1250.010 requires *all* condemnation actions to occur in state superior court, making no provision for actions such as this to occur in federal district court, as this Court has held in *Minnesota v. U.S.*, 305 U.S. 382 (1939).

The District Court rejected each of these contentions and entered partial judgment for SCE on September 10, 1980. Based on a stipulation regarding just compensation and preserving the Indian allottees' right to appeal, the District Court entered a final judgment on August 17, 1981. The Indian allottees filed a timely notice of appeal and raised the same issues to the Court of Appeals for the Ninth Circuit, which affirmed on August 26, 1982.

The Indian allottees now seek review of this judgment in order to present to this Court important questions of federal Indian law on which this Court reserved judgment in *U.S. v. Clarke*, 445 U.S. 253, 254, n. 1 (1980). These questions are of great practical importance to these six Indian

allottees, and to all Indian allottees across the nation, because they deal with whether the allotted trust lands of all such Indian allottees are subject to taking under 25 U.S.C. §357 for rights of way more or less at will by any party possessing the power of eminent domain under state law, or whether it is necessary, instead, for such would-be condemnors to proceed under 25 U.S.C. §§323-4, which permit such rights of way to be granted "subject to such conditions as [the Secretary of the Interior] may prescribe" for the protection of the Indians.

The allottees of the Agua Caliente Indian Reservation fought long and hard to obtain their allotments. Even though such allotments had been authorized by the General Allotment Act of February 8, 1888 (25 U.S.C. §331, et seq., 24 Stat. 388) and the Mission Indian Relief Act of January 2, 1891 (26 Stat. 716), and even though Congress specifically *directed* the Secretary of the Interior to make these allotments by Section 3 of the Act of March 2, 1917 (39 Stat. 969, 976), the Secretary refused to act. Members of the tribe obtained a determination of the Secretary's duty to allot in *Arenas v. U.S.*, 322 U.S. 419 (1944), which was further clarified in further litigation leading to the Agua Caliente Equalization Act of September 21, 1959 (25 Stat. §951, et seq., 73 Stat. 602) under which their patents were finally issued in 1961 declaring that the United States would hold the various parcels "in trust for the sole use and benefit" of the respective allottees. After all this effort to secure their allotted land base, the allottees now seek a determination of whether their hard-won trust allotments are available, essentially for the asking, to any party with a state-granted power of eminent domain for rights of way.

This Court noted, but did not reach, these issues in *U.S. v. Clarke*, 445 U.S. 253, 254, n. 1 (1980). The Court of Appeals for the Tenth Circuit has joined that for the Ninth Circuit in resolving these points against the Indians in *Yellowfish v. City of Stillwater*, ____F.2d____, No. 81-1948 (April 28, 1982), but the U.S. District Court for the District of Nebraska has resolved the same issues in favor of the

Indians in *Nebraska Public Power District v. 100.95 Acres of Land, etc., et al.*, ____F.Supp.____, No. 79-0-411, June 4, 1982, appeal pending. These questions are of great significance to all those who seek or resist condemnation of rights of ways across allotted Indian trust lands which, although previously often remotely located, are now increasingly located in the path of urban expansion. The issues are ripe for determination and the present six Indian allottees now seek their resolution for the benefit of all Indian allottees and all those who seek to condemn rights of way across their allotted trust lands.

REASONS FOR GRANTING THE WRIT

I.

Whether 25 U.S.C. §357 and 25 U.S.C. §§323-4 are alternative ways for a would-be condemnor to obtain a right of way across allotted trust lands, or whether the latter displaces or repeals the former to the extent of overlap, is an important question of federal Indian law not yet passed upon by this Court.

Prior to 1901, there was no way for a would-be condemnor to obtain any interest in the lands of federal Indian reservations which had been allotted under the General Allotment Act of February 8, 1888 (25 U.S.C. §331 et seq., 24 Stat. 388). By 1900, more than 60,000 allotments, covering more than 5,500,000 acres, had been approved and the process was slowing down. Cohen, *Federal Indian Law*, 210-1 (1942). The purpose of this policy of allotment "was to end tribal land ownership on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976). See also *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). Allotted lands were to

remain in trust for 25 years, 25 U.S.C. §348, after which "every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 25 U.S.C. §349. When enacted in 1901, 25 U.S.C. §357 was a part of the entire allotment program, which simply made one group of state laws, those governing condemnation proceedings, applicable to allotted lands several years prior to the expiration of the trust period, when *all* state laws would apply.

The allotment policy proved disastrous. Between its beginning in 1887 and 1934, it and the sale of so-called "surplus lands" had cut Indian land holdings from 138,000,000 to 48,000,000 acres. See Hearings on H.R. 7902, Committee on Indian Affairs, 73d Cong.2d Sess. 15-18 (1934). The policy of allotment "was repudiated in 1934 by the Indian Reorganization Act [IRA], 48 Stat. 984, now amended and codified as 25 U.S.C. §§461 *et seq.*" *Mattz v. Arnett, supra*, 412 U.S. at 496 n.18, quoted in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478-79 (1976). See also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973) ("Unquestionably, the [Indian Reorganization] Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment.") Section 1 of the IRA, 25 U.S.C. §461, prohibited further allotments. Section 2, 25 U.S.C. §462, extended the existing periods of trust "until otherwise directed by Congress." Section 3, 25 U.S.C. §463(a), authorized the Secretary to restore remaining, undisposed surplus lands to tribal ownership. Section 4, 25 U.S.C. §464, prohibited any "sale, devise, gift, exchange, or other transfer of restricted Indian lands . . ." except as provided in the Act. And Section 5, 25 U.S.C. §465, appropriated funds for the acquisition of additional tribal and allotted lands for Indians. While none of these provisions of the Indian Reorganization Act is directly applicable to the present case, they do demonstrate the extent to which federal Indian policies changed between 1901 and 1934.

The 1948 Indian Right of Way Act, 25 U.S.C. §§323-8, embodies and furthers the policies of the IRA. This is most evident in Section 2 of the 1948 Act, 25 U.S.C. §324. It precludes secretarial grants of rights of way over tribal lands without the consent of tribes organized under the IRA and other related laws. It also requires the allottees' consent for rights of way over allotted lands except in specifically described circumstances when obtaining the consent of all those with interests in the allotment would be impractical or unfair. These requirements are in keeping with the spirit of the IRA, to "turn . . . over to the Indians a greater control of their own destinies." *Morton v. Mancari*, 417 U.S. 535, 553 (1974). They would be nullified if rights of way across allotted lands could be obtained by condemnation pursuant to 25 U.S.C. §357.

When recent expressions of Congress' policies toward Indians undermine or are inconsistent with prior laws, this Court has given effect to the subsequent enactment. In *Bryan v. Itasca County*, 426 U.S. 373, 386-87 (1976), an act that was a product of the termination era of the 1950's was construed in a manner that was more consistent with the Indian Civil Rights Act of April 11, 1968, 25 U.S.C. §1301, et seq., 82 Stat. 73, 77.

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477-79 (1976), is even more directly on point. It held that a provision of the 1887 General Allotment Act, 25 U.S.C. §349, which subjects allottees to the civil and criminal laws of the states after issuance of fee patents, had been impliedly repealed as to reservation allotments. The Court noted that Congress had repudiated the allotment policy in 1934 and "by its more modern legislation has evinced a clear intent to eschew any such "checkerboard approach within an existing Indian Reservation." 425 U.S. at 479. This case is identical in that the allotment policies on which §357 was predicated have been repudiated and, by its more recent legislation, i.e., the IRA and the 1948 Right of Way statute, 25 U.S.C. §§323-4, Congress has evinced a clear intent to prevent the alienation or transfer of allotted lands without the consent of the Indian landowners.

In these circumstances, the rules enunciated and followed in *Bryan* and *Moe* inescapably lead to the conclusion that rights of way across allotted Indian lands are now governed by 25 U.S.C. §§323-4, while 25 U.S.C. §357 remains applicable only to non-right of way situations, such as the condemnation of the entire interest. As stated in *Bryan, supra*, 426 U.S. at 388 n.14:

> [C]ourts "are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship."

Moe carries this rule one step further by holding that current congressional policies should be implemented even when they result in an otherwise disfavored partial repeal by implication.

It would be most anomalous indeed if the consent of Indian allottees were a prerequisite to grants of rights of way by the Secretary, the Indians' trustee, but rights of way could be obtained by condemnation without the approval of either the Secretary or the allottees. This Court left open the question of the interrelationships between 25 U.S.C. §357 and 25 U.S.C. §§323-4 in both *Minnesota v. U.S.*, 305 U.S. 382, 391 (1939) and *U.S. v. Clarke*, 445 U.S. 253, 254, n. 1 (1980). The question is now ripe for review because of its recurrence in the Eighth, Ninth, and Tenth circuits and because of the cloud that these unanswered questions cast over all rights of way acquired across allotted trust lands since 1948 on the supposition that the more stringent requirements of 25 U.S.C. §§323-4 could be avoided by the simple expedient of relying instead only on 25 U.S.C. §357. These questions will recur, and this cloud will persist, until this Court reaches these issues which it reserved for future consideration in *Minnesota* in 1939 and in *Clarke* in 1980.

II.

The Court of Appeals' opinion frustrates Congressional purposes in allowing allotted trust lands to be treated as if they served no public purpose or use.

Even if 25 U.S.C §357 is otherwise available for the condemnation of a right of way across allotted trust lands, all such condemnations must occur "under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned." 25 U.S.C. §357. Thus, any protection afforded to a condemnee under state law must be respected, not only because the terms of 25 U.S.C. §357 so state, but also because the Rules Enabling Act of June 25, 1948, as amended, 28 U.S.C. §2072, 62 Stat. 961, requires that the federal rules of civil procedure, including Rule 71A(k) under which this action occurred, "shall not abridge, enlarge or modify any substantive right."

California Code of Civil Procedure §§1240.510 and 1240.610 require that any complaint in eminent domain contain allegations that the condemnor's intended public use or purpose for the subject property is "more necessary than" or "not incompatible with" the present public use or purpose of the property, if any. The public purpose of allotted trust lands is clear from this Court's prior references to how retaining such lands in restricted trust status is intended to give Indian allottees (1) time and opportunity to learn non-Indian ways leading toward eventual assimilation into the non-Indian society at the end of the trust period, (2) a place to live and to become self-sufficient, and (3) protection against improvident conveyances. See *Montana v. U.S.*, ____U.S.____, 101 S.Ct. 1245, 1253 (1981); *U.S. v. New Mexico*, 438 U.S. 696, 698 (1978); *Arizona v. California*, 373 U.S. 546, 598, 600-601 (1963); *Squire v. Capoeman*, 358 U.S. 1, 10 (1956); *U.S. v. Rickert*, 188 U.S. 432, 437, 441 (1903).

While the Court of Appeals acknowledged these points, it nevertheless held that allotted lands were not " 'appropriated to public use' in the sense contemplated by the California statute." This may be true as a matter of state law, but the question is rather one of federal law. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 678 (1974). The federal law on this point is as noted above, and the treatment of this question by the Court of Appeals as a matter of state law deprives the Indian allottees of the kind of "substantive right" protected by 25 U.S.C. §357 and 28 U.S.C. §2072, to their obvious detriment. Given the enormous threat to the remaining Indian trust land base and the frustration to the above Congressional policies of ending the erosion of this trust land base, the need for this Court to re-affirm respect for this substantive right is of enormous importance for all Indian allottees throughout the country. Quirks of state law should not thus be permitted to frustrate the above clear indications of Congressional intent to protect such "substantive rights" of allottees during the condemnation process. In this sense, the situation is akin to that which led this Court to grant certiorari in *U.S. v. Clarke, supra*, "to decide the question '[w]hether 25 U.S.C. [§]357 authorizes a state or local government to 'condemn' allotted Indian trust lands by physical occupation.' " *Id.*, 445 U.S. at 254. So too here.

III.

California has overstepped its own disability to take advantage of 25 U.S.C. §357 by requiring all condemnation actions to occur in state court, rather than federal district court, as this Court has held.

In its leading case of *Minnesota v. U.S.*, 305 U.S. 382 (1939), this Court emphasized how all actions under 25 U.S.C. §357 *must* occur in federal district court, exclusive of *any* state court, as a matter of the waiver of federal sovereign immunity encompassed by 25 U.S.C. §357.

However, as noted above, both the language of 25 U.S.C. §357 and Rule 71A(k) of the Federal Rules of Civil Procedure require that all condemnation actions must occur "under the laws of the State" where the land sought to be condemned is located. California Code of Civil Procedure §1250.010 requires all condemnation actions to occur *only* in state superior court. This provision of state law is applicable as a "substantive right" protected by this provision of the Rules Enabling Act (28 U.S.C. §2072) and by Rule 71A(k), as well as 25 U.S.C. §357, so that it must be respected. This is not a case of a state statute divesting a federal district court of jurisdiction which it would otherwise have. Nor is it a question of venue. Rather, it is simply a substantive provision of state law by which the state limits itself to the use of one particular named state court, exclusive of all other courts.

Therefore, until either California expands its statute to allow such actions to occur in federal district court, or until Congress amends 25 U.S.C. §357 to permit such actions to occur in state court, California has disabled itself and all those acting under its authority from taking advantage of 25 U.S.C. §357. Unless this Court grants review of this point, California will continue to overstep its own self-imposed limitation on choice of courts for such actions, and Indian allottees will continue to be deprived of this additional supposedly-protected "substantive right" in violation of language of 25 U.S.C. §357 and the Rules Enabling Act.

CONCLUSION

For the reasons noted above, the six Indian allottees respectfully urge the Court to grant their petition so that these important and recurring questions of federal Indian law, previously twice reserved by this Court, can be answered to provide guidance to the lower federal courts in deciding these frequently-raised issues, and to clarify the

validity of all rights of way over allotted trust lands acquired under 25 U.S.C. §357 since 1948.

Respectfully submitted,

Art Bunce, Counsel of Record for
Petitioners Rice, Miller, Ward,
Miranda, Preckwinkle, and Nelson

Dated: November 24, 1982

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation

Plaintiff,

v.

33.49 ACRES OF LAND IN THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, et al., and UNKNOWN OWNERS,

Defendants.

No. CV 79-3709-RJK

MEMORANDUM OF DECISION AND ORDER

This is an action in eminent domain brought by plaintiff Southern California Edison Company, pursuant to 25 U.S.C. § 357, to condemn a right-of-way for electrical transmission lines across land allotted to Indians. The Act requires that the United States be named as a party since it holds the land in trust for the Indians. Plaintiff seeks use of the property for construction of powerlines and for the necessary access roads and facilities to maintain those lines.

The complaint in this action was filed on September 25, 1979. The Indians to whom the land was allotted filed an answer on December 31, 1979. The United States filed a Notice of Appearance on December 17, 1979. Defendant Wingate Air Conditioning filed a Notice of Appearance on January 24, 1980. No other defendant, including the State of California, has filed an answer or otherwise appeared.

On April 11, 1980, defendants Rice, et al. filed a motion to dismiss this action on the grounds (1) this Court lacks subject matter jurisdiction over this action because all condemnation actions brought pursuant to California law allegedly must be brought in state court; (2) the complaint fails to state a claim because it fails to make the allegations regarding comparative public uses of the land in question; (3) this Court should abstain from applying the provisions of the newly-enacted California eminent domain law until such statutes are first construed by the state courts; and that 25 U.S.C. § 357 is not available for the acquisition of a right-of-way across land held by Indians in the form of allotments. On April 17, 1980, plaintiff filed an opposition. Defendants filed a reply on April 21.

On April 18, 1980, plaintiff filed a motion for partial summary judgment, noticed for May 5, 1980. Essentially, plaintiff's motion seeks adjudication of all issues regarding plaintiff's right and power to acquire the right-of-way in question pursuant to 25 U.S.C. § 357, with the exception of determination of the amount of just compensation for the taking of the property. On April 30, 1980, defendants Rice, et al. filed an opposition. Because the two motions were addressed to the same issues and likely would result in a disposition on the merits in favor of one or the other party, the motions were submitted together as of May 5, 1980 and are treated together here.

Issues Presented

I. Defendants Rice, et al. Motion to Dismiss

(1) Whether this Court has subject matter jurisdication over this condemnation action brought pursuant to 25 U.S.C. § 357;

(2) Whether 25 U.S.C. § 357 may be used here to acquire a right-of-way across Indian lands by way of condemnation, or whether the procedures set forth in 25 U.S.C §§ 323-324 — requiring approval of the Secretary of the Interior and consent of the affected Indians — must be utilized instead;

(3) Whether this Court should abstain from applying the provisions of the newly-enacted California eminent domain law until such statutes are first construed by the state courts;

(4) Whether the complaint fails to state a claim because it fails to make allegations regarding the public use for which the land is sought as compared with the public use to which the land is currently being devoted.

II. Plaintiff's Motion for Partial Summary Judgment

Whether a genuine issue exists as to any material fact regarding the proper procedure for acquisition of the right-of-way in question here, and whether such acquisition should occur pursuant to the procedure set forth in 25 U.S.C § 357 — judicial condemnation of Indians lands — or, instead, pursuant to 25 U.S.C. §§ 323-324 — acquisition conditioned upon approval of the Secretary of the Interior and consent of the Indians who are affected.

I. Defendants Rice, et al. Motion to Dismiss

This action is brought by plaintiff Southern California Edison Company, a public utility which, pursuant to CAL. PUBLIC UTILITIES CODE § 614, "may condemn any property necessary for the construction and maintenance of its electric plant." Plaintiff brings this action pursuant to 25 U.S.C. § 357, which provides: "Land allotted in severalty to Indians may be condemned for any public purpose under the Laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

Defendants Rice, et al. raise a number of grounds in support of their motion to dismiss. First, defendants contend

that this Court lacks subject matter jurisdiction over this action because all condemnation actions brought pursuant to California law supposedly must be brought in state court. Defefendant cites CAL. CODE CIV. PROC. § 1250.010 which provides that, with certain enumerated exceptions, all eminent domain proceedings shall be brought in state superior court. Defendants misapprehend the import of 25 U.S.C. § 357. Section 357 creates a federal right of action for condemnation of Indian land, but, as part of the substantive law to be applied, chooses to incorporate California law regarding eminent domain. Such incorporation fails to defeat plaintiff's federal right of action, and hence subject matter jurisdiction exists in this Court.

Second, defendants contend that plaintiff should have proceeded under 25 U.S.C. §§ 323-324, rather than under 25 U.S.C. § 357, and hence this Court lacks jurisdiction to consider plaintiff's claim. Since the propriety of plaintiff's reliance upon § 357 is the basic issue to which plaintiff's motion for partial summary judgment is addressed, discussion of this issue will be reserved until consideration of plaintiff's motion, which is based upon an agreed statement of facts.

Third, defendants contend that the Court should abstain from application of the California eminent domain provisions because such provisions are newly-enacted and have not been subject to extensive consideration and interpretation by the California state courts. However, defendants can point to no provision whose novel and intricate character is such that this Court should abstain indefinitely pending its interpretation.

Fourth, defendants allege that plaintiff fails to state a claim in that the complaint fails to allege, as required under California law, that the public use for which the land is sought to be condemned (a) will not impair the public use to which the land is currently being put and (b) is a more necessary public use than the public use to which the land is currently being devoted. Consideration of this issue is reserved until after determination of the propriety of plaintiff's use of the procedure set forth in 25 U.S.C. § 357.

II. Plaintiff's Motion for Partial Summary Judgment

The following facts are undisputed and are set forth in a stipulation of the parties. Plaintiff is a public utility authorized by the State of California to engage in the business of purchasing, generating, transmitting, distributing, and selling of electricity to customers in California. The property which is the subject of this condemnation action is being acquired for a public purpose under the laws of California. The property is being sought for the following public uses: electric power lines, electric heat lines, and electric light lines necessary to supply electric light, heat, and power to its customers, together with byroads to reach such lines.

The nature of the rights-of-way and easements sought may be stated generally as follows: rights to construct and maintain overhead electric transmission lines, together with supports therefor; right to pass on, over, and along, the land in question by means of vehicles and foot to aid such construction and maintenance; right to prohibit the building of any structure by defendants on said land; and right to construct and maintain such roads as are necessary to provide access to the site of such powerlines. The parties further agree that the real property which is the subject of this action is accurately described in Paragraph 10 of the complaint and that the names of all defendants with interests in the property being sought are listed in Paragraph 11 of the Complaint.

Defendants Miller, Miranda, Nelson, Preckwinkle, Rice, and Ward are members of the Agua Caliente Band of Cahuilla Indians, a federally-recognized Indian tribe. Pursuant to Patent Nos. 1223349, 1223336, 1223323, 1223322, 1223347, issued on October 12, 1961, the United States declared that it "does and will hold the land thus allotted . . . in trust for the sole use and benefit of" defendants Rice, Miller, Miranda, Ward, Preckwinkle, and Nelson, respectively, pursuant to the Act of September 21, 1959, 73 Stat. 602, 25 U.S.C. § 951 *et seq*. The parties agree that the real

property in question is land allotted in severalty to the individual Indian defendants.

Finally, it is undisputed that on July 17, 1979, the California Public Utilities Commission issued a Certificate of Public Convenience and Necessity in Decision No. 90552 to Southern California Edison Company to construct the Devers-Palo Verde 500 KV Transmission Line which is the project for which the property in question is being condemned. By issueance of this Certificate, the California Public Utilities Commission found that this project is essential to meet future public convenience and necessity.

The basic issue for determination by the Court is whether the proper procedure for acquisition of the rights-of-way and easements herein sought is that set forth in 25 U.S.C. § 357 — judicial condemnation of Indian lands — or, instead, that set forth in 25 U.S.C. §§ 323-324 — acquisition of rights-of-way over Indian lands conditioned upon approval of the Secretary of Interior and upon the consent of the Indians whose land is affected. Section 323 set forth the following procedure:

> "The Secretary of Interior ... is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation by individual Indians or Indian tribes, communities, bands, or nations ... and any other land heretofore or hereafter acquired or set aside for the use and benefit of Indians."

Section 324 adds the following requirement:

> "No grant of a right-of-way over and across any lands belonging to a tribe ... shall be made without the conset of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant

> will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds that it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof."

The gist of the dispute between the parties as to this issue is as follows. Plaintiff contends that the Section 357 judicial condemnation procedure and the Sections 323 and 324 procedure conditioned upon approval of the Secretary and the affected Indians are mere alternative paths, both of which are equally applicable to context at hand. Defendants Rice, et al., on the other hand, maintain that the procedure set forth in Sections 323 and 324 is the exclusive means by which plaintiff may acquire any interest in their lands. Therefore, defendants conclude that this Court lacks subject matter jurisdiction to consider this action because plaintiff has brought its claim pursuant to a procedure inapplicable to the case at hand, namely the procedure under Section 357.

Defendants must confront, and distinguish, what seems to be a controlling precedent in the Ninth Circuit: *Nicodemus v. Washington Water Power Company*, 264 F.2d 614 (9th Cir. 1959), *rehearing den.* (1959), a case whose facts are nearly identical to those in the case at hand. *Nicodemus* involved an effort by an Idaho utility to gain condemnation, pursuant to 25 U.S.C. § 357, of an easement for the construction and maintenance of an electric transmission line over and along a tract of land which was allotted in severalty to a member of an Indian tribe, with the title to such tract being held in trust for such Indian by the United States. One of the contentions raised by the Indian landholder therein was that the decree of condemnation was invalid as being procured without the permission of the Secretary of Interior. There, as here, the Indian landholder contended that the procedure set forth in Section 323 should have been followed instead of that set forth in Section 357. The Ninth Circuit ruled: "In our opinion Section 323 and Section 357 offer two methods for the acquisition of an easement across allotted Indian land for the construction of an electric transmission line. The United

States has consented to both methods. * * * We hold that the appellee [power company] was not required to secure the permission of the Secretary of the Interior before initiating the condemnation suit under Section 357." 264 F.2d at 618.

The *Nicodemus* Court relied upon *United States v. State of Minnesota*, 113 F.2d 770 (8th Cir. 1940), which involved the issue of whether the State of Minnesota could acquire, by way of 25 U.S.C. § 357, an easement over allotted land for the establishment of a public highway, without having first secured the approval of the Secretary of Interior for the establishment of such a highway through the allotted Indian land as required under 25 U.S.C. § 311. The Eight Circuit reasoned:

> "The land involved, being allotted in severalty, is no longer a part of the reservation, nor is it tribal land. * * * The statutes seem definitely to offer two methods of procedure for the acquisition of a right of way for public highways. Section 3, 25 U.S.C.A. § 357, authorizes the maintenance of condemnation proceedings. * * * By Section 4 of the Act, 25 U.S.C.A. § 311, the Secretary is authorized to grant permission for the opening and establishment of a public highway through lands allotted in severalty. Thus, it was made possible to acquire such a right of way by either of two methods, the Government having consented to each of these methods. So considered, each of these sections is an effective and reasonable provision in the procedure for the acquisition of a right of way, neither dependent upon the other." 113 F.2d at 773.

In *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 214-215, 63 S. Ct. 534, 538 (1943), the U.S. Supreme Court distinguished between the condemnation procedure set forth in Section 357 and the procedure set forth in Section 311 requiring approval of the Secretary for the construction of a highway (analogous to Section 323) as follows: "We think Congress employed this language in the Act of March 3, 1901, to a purpose and with a clear distinction between reservations and allotted lands. Section 3 [of the 1901 Act, codified as 25 U.S.C § 357] made allotted lands, but not reservations, subject to condemnation for any public purpose; § 4 [of 1901 Act, codified as 25 U.S.C. § 311] made both reservations and allotted lands subject to highway permits by the Secretary."

Finally, in *Transok Pipeline Company v. Darks*, 565 F.2d 1150, 1153 (10 Cir. 1977), *rehearing den.* (1977), *cert. den.*, 435 U.S. 1006, 98 S. Ct. 1876 (1977), an action brought by a pipeline company to condemn lands allotted in severalty to Indians, the Tenth Circuit adopted the view that the procedure set forth in § 357 and that set forth in §§ 323-324 are alternative, equally permissible means applicable to the same end — acquisition of a right-of-way over Indian land allotted in severalty. The Court reasoned: "[T]he consent of the Secretary is required in order for a state to acquire the rights of way across allotted lands under 25 U.S.C. §§ 311, 312, 319, 321, 323, but § 357 does not impose such a requirement. *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959); *United States v. Oklahoma Gas & Elect. Co., supra.* Undoubtedly Congress considered the safeguards available in federal judicial proceedings to be sufficient so that the permission of the Secretary was not required."

The gist of defendants' response is that *Nicodemus* is not controlling here. First, defendants cite much authority for the general proposition that federal law relating to Indian affairs has always been applied in a manner as favorable to the Indians as possible. *E.g., Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975) (" ... ambiguities in Federal treaties or statutes dealing with Indians must be resolved favorably to the indians.") Second, defendants maintain that 25 U.S.C. §§ 323-324 has implicity limited the applicability of § 357 to the acquisition of rights-of-way over Indian lands. Defendants contend that because §§ 323-324 were adopted some forty years after § 357, and because §§ 323-324 specifically relate to rights-of-way over Indian lands — as contrasted with § 357 which is merely a general condemnation provision for Indian lands — the procedure set forth in §§ 323-324 should have been followed by plaintiff here. Defendants rest this contention in part on the fact that § 357 was adopted during the pendency of the Indian land allotment program — a program which defendants assert was repudiated with the adopted of 25 U.S.C § 461 which prohibited further allotments.

Finally, defendants point to *United States v. 10.69 Acres of Land, More or Less, in Yakima County*, 425 F.2d 317 (9th Cir. 1970), in which the Ninth Circuit ruled that unallotted tribal lands held in trust by the United States for the benefit of certain Indian tribes must be acquired for interstate highway purposes, not by way of the United States' general power to condemn lands for highway purposes, but rather by the detailed administrative procedure set forth in 23 U.S.C. §§ 107(d) and 317. Defendants conclude that this ruling is applicable by analogy to the case at hand and stands for the proposition that a specific procedure for the acquisition of rights-of-way should prevail over a general condemnation provision. Defendants note that the *10.69 Acres* Court referred to § 357 and §§ 323-324 as being "complementary" provisions. However, the distinction the Ninth Circuit seems to draw between the two procedures is that § 357 may be used to acquire lands allotted in severalty to individual Indians, whereas §§ 323-324 is to be used to acquire unallotted Indian reservation lands. The Court reasoned that allotted lands are held by individuals, and hence no conflicting governmental use is likely to be present; however, where unallotted Indian reservation lands held in trust by the United States are involved, a conflict arises between the governmental use for which the land is sought and the governmental use to which the land is already being devoted. This latter conflict necessitates resolution by a closely circumscribed administrative procedure involving the participation of the Secretaries of both Transportation and Interior. Lastly, the Ninth Circuit added the following observation:

> "Since the lands involved [in the acquisition for a highway right-of-way] were unallotted tribal lands held in trust by the United States, it is conceded that the State could not condemn them. *Compare* 25 U.S.C. § 357, which permits condemnation by the State for any public purpose of '[l]ands allotted in severalty to Indians * * *' " 425 F.2d at 318.

Finally, defendants rely on CAL. CODE CIV. PROC. §§ 1240.510 and 1240.610 which provide, respectively, that in dondemnation actions involving land already devoted to a

public use, the condemnor must allege and demonstrate that the public use for which the land is sought will not unreasonably impair the existing public use and that the public use for which the land is sought is of greater weight than the existing use. Defendants argue that plaintiff's complaint fails to state a claim because it fails to include these allegations.

However, plaintiff points to *United States v. Bowling*, 256 U.S. 484, 487, 41 S. Ct. 561, 562 (1921), noted than an Indian trust allotment — where, as here, the individual Indian is given a trust patent stating that the United States will hold the land in trust for a designated period for the sole use and benefit of the individual Indian — is subject to supervisory control by the United States "to make sure that [the allotment] inures to the sole use and benefit of the allottee . . ." Additionally, the Ninth Circuit in *Nicodemus, supra*, adopted the proposition set forth by the Eighth Circuit in *State of Minnesota, supra*, that "'[t]he land involved, being allotted in severalty, is no longer part of the reservation, nor is it tribal land. [additional language unquoted by the Ninth Circuit: "The virtual fee is in the allottee, with certain restrictions on the right of alienation. This restriction, consistent with the Government's paternal policy toward the Indians, was doubtless to protect the Indian from being over-reached in the sale of his land.]'" 264 F.2d at 618.

Despite defendants' valiant, intriguing, and well-reasoned arguments to the contrary, the § 357 condemnation procedure does seem to be a proper means to acquire the rights-of-way and easements herein sought. The Eighth, Ninth, and Tenth Circuits have all held that § 357 represents an alternative means by which rights-of-way over allotted Indian lands held in severalty may be acquired. Such lands being devoted to the sole use and benefit of the Indian allottees, plaintiff need make no greater showing than heretofore made regarding the public use to which the condemned land will be put as contrasted with the existing use.

Accordingly, there being no genuine issue as to any material fact, plaintiff Southern California Edison Company is entitled to partial summary judgment as a matter of law as to all issues relating to the propriety of plaintiff's acquisition of the interests in land sought herein. The sole issue remaining in this action is the determination of the amount of compensation to be paid to the Indian allottees for the taking of interests in their lands. Defendant's Motion to Dismiss this action for lack of subject matter jurisdiction and for failure to state a claim is hereby ORDERED DENIED.

On the issue of just compensation, IT IS ORDERED that each party to said issue:

1. Conclude all discovery not later than November 20, 1980;

2. File not later than December 10, 1980 a Memorandum of Contentions of Fact and Law, in all respects in full conformity with Local Rule 9;

3. File not later than December 20, 1980 a proposed form of Pre-Trial Conference Order, in all respects in full conformity with Local Rule 9.

The Pre-Trial Conference is set for January 5, 1981 at 10:00 a.m. There will be no continuances thereof granted.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: September 10, 1980.

ROBERT J. KELLEHER
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA EDISON COMPANY,
a corporation,

Plaintiff-Appellee,

v.

STEVEN ALLEN RICE; ANITA VIVIAN MILLER;
CHERYL SAUBEL MIRANDA; ELLEN RICE WARD;
BOBBIE RAY PRECKWINKLE; and
LAVERNE SAUBEL NELSON,

Defendants-
Appellants,

UNITED STATES OF AMERICA,

Defendant-Appellee,

and

33.49 ACRES OF LAND IN THE COUNTY OF
RIVERSIDE, STATE OF CALIFORNIA;
GOODYEAR SERVICE STORES; JOHN H.
WINGATE, JR.; TIMOTHY J. WHITE;
JOHN R. STOTTS, JR.; VERNON H.
HOLBROOK, d/b/a WINGATE AIR
CONDITIONING SERVICE, partnership;
and UNKNOWN OTHERS,

Defendants.

No. 81-5725

D.C. NO. 79-3709-RJK

OPINION

Appeal from the United States District Court
for the Central District of California

Robert J. Kelleher, District Judge, Presiding

Argued and Submitted May 5, 1982

Before: ELY, SCHROEDER, and NORRIS, Circuit Judges

ELY, CIRCUIT JUDGE:

Appellants, members of the Agua Caliente Band of Cahuilla Indians, appeal from a summary judgment granted to Southern California Edison Company ("the Company") on its complaint in eminent domain. We affirm.

The Company instituted this action in federal court pursuant to 25 U.S.C § 357[1] seeking to condemn a right-of-way to install electrical transmission lines over lands allotted to the Indian appellants herein.[2] The United States, as trustee for the allottees and owner of title to the allotments, was named as defendant. *See Minnesota v. United States*, 305 U.S. 382, 389 (1939). The allottees filed an answer raising as affirmative defenses lack of subject matter jurisdiction and failure to state a claim under California eminent domain law.

[1] The section, enacted in 1901, provides: Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State of Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee. 25 U.S.C. § 357.

[2] The Indians' allotments were authorized by the Act of March 2, 1917, ch. 146, 39 Stat. 969, 976, and the Agua Caliente Equalization Act of 1959, Pub. L. No. 86-339, 73 Stat. 602 (codified at 25 U.S.C. §§ 951-958 (1976)). *See Arenas v. United States*, 322 U.S. 419 (1944); *United States v. Pierce*, 235 F.2d 885 (9th Cir. 1956). Patents issued to the Indian allottees declare that the United States holds the land "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made." 25 U.S.C § 348.

The District Court, following this Court's decision in *Nicodemus v. Washington Water Power Company*, 264 F.2d (9th Cir. 1959), held that section 357 authorized condemnation of rights-of-way over the allotments. The District Court in the present case also found that the Company had stated a claim under California eminent domain law. Pursuant to its memorandum of decision, the District Court rendered summary judgment for the Company after the parties had stipulated to the amount of compensation. The allottees reserved their right to appeal from the judgment on the issues other than just compensation and timely filed their notice of appeal.

The Indian allottees' first contention on appeal presents the issue whether land allotted in severalty to Indians, held in trust by the United States for the "sole use and benefit of the Indian," 25 U.S.C. § 348, constitutes "property appropriated to public use" within the meaning of the California eminent domain law, Cal. Civ. Pro. Code §§ 1235.180, 1240.510, 1240.610. If the allottees' land is considered "property appropriated to public use," then the Company's complaint in eminent domain is subject to dismissal for failure to allege that the public use it proposes is either compatible with or more necessary than the existing use. *See id.* §§ 1240.510, 1240.610; *Woodland School District v. Woodland Cemetery Association*, 174 Cal. App. 2d 243, 245, 344 P.2d 326, 327 (1959).

We conclude that the Indian allottees' land is not "property appropriated to a public use" within the meaning of the California eminent domain law. The state has defined "property appropriated to public use" as "property ... in use for a public purpose." Cal. Civ. Pro. Code § 1235.180. *See East Bay Municipal Utility District v. Lodi*, 120 Cal. App. 740, 750-58, 8 P.2d 532, 536-39 (1932). The California Supreme Court has construed "public use" as "'a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government.'" *City of Oakland v. Oakland Raiders*, 31 Cal. 3d 656, 665 (1982) (quoting *Bauer v. County of Ventura*, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955)). Thus, "appropriated to public

use," in the context of the California eminent domain law, appears to refer to prior condemnations authorized by the California Legislature. *See, e.g., East Bay Municipal Utility District*, 120 Cal. App. 740, 8 P.2d 532.[3]

Moreover, although land allotted in severalty to individual Indians may be said to further in some sense federal policies toward Indians, the very nature of the allotment scheme and section 357 shows that these lands are not "appropriated to public use" in the sense contemplated by the California statute. The Congressional policy of allotting tribal land to individual Indians was intended to promote assimilation of Indians into American society. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 650 n.1 (1976). This policy was furthered by protecting Indians from the operation of state laws that might decrease the economic value of their allotments. *See Squire v. Capoeman*, 351 U.S. 1, 9-10 (1956); *United States v. Rickert*, 188 U.S. 432, 437 (1903).

With respect to condemnation actions by state authorities, Congress explicitly afforded no special protection to allotted lands beyond that which land in fee already received under the state laws of eminent domain. *See* 25 U.S.C § 357. Thus, consistent with its assimilation policy, Congress placed Indian allottees in the same position as any other private landowner *vis-a-vis* condemnation actions, with the interest of the United States implicated only to the extent of assuring a fair payment for the property taken and a responsible disposition of the proceeds. *See Minnesota v. United States*, 305 U.S 382, 388 (1938). Although United States policy toward Indians may have shifted away from an assimilationist approach in the years since the allotments were made, *see Morton v. Mancari*, 417 U.S. 535, 551 (1974), the fact that Congress has not amended or

[3] That the California Legislature intended sections 1240.510 and 1240.610 to permit an accommodation between prior and subsequent condemnations by state-authorized entities is supported by the general rule that a state may not condemn federally owned lands within its boundaries without the consent of the United States Government. *See generally* 1 J. Sackman, *Nichols on Eminent Domain* § 2.22 (3d ed. 1981).

repealed section 357 shows that the position of Indian allottees with respect to condemnation actions under state law has not changed.[4]

Thus, the status of Indian allottees under section 357 does not implicate the situation addressed by the pleading requirements of the California law concerning "property appropriated to public use." Since Congress, with respect to state condemnation actions, has chosen to have Indian allottees remain in virtually the same position as those who privately own land for their sole use and benefit, the potential for a conflict in public uses that arises when a public entity attempts to condemn land already in use for a public purpose is not presented in this situation.[5] *See, e.g., Woodland School District*, 174 Cal. App. 2d at 245-46, 344 P.2d at 327. The Company's complaint in eminent domain was not subject to dismissal under Cal. Civ. Pro. Code §§ 1240.510, 1240.610 for failure to allege a compatible or more necessary public use.

Second, the Indian allottees contend that 25 U.S.C §§ 323-324, which empower the Secretary of the Interior to grant rights-of-way "for all purposes" only with the consent of Indian allottees, is the exclusive means by which the Company may obtain its right-of-way across their allotted lands. This issue is squarely controlled by *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959). Section 357, which provides that lands allotted in severalty to Indians may be condemned for any purpose in accordance with state law, *see* note 1 *supra*, is an *alternative* method for the acquisition of an easement across allotted

[4] Congress recently indicated that section 357 is still in force when it extended operation of that section, and reemphasized the applicability of sections 323-328, to the Pueblo Indians of New Mexico. *See* Act of Sept. 17, 1976, Pub. L. No. 94-416, § 3, 90 Stat. 1275; H.R. Rep. No. 800, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2368, 2369-70.

[5] That Congress consented to state condemnation of allotted Indian land "for *any* public purpose," 25 U.S.C. § 357 (emphasis added), is a further indication that Congress does not consider allotted land to be property already devoted to a potentially conflicting public use.

Indian land to which the United States has consented. 264 F.2d at 618. *Accord, Yellowfish v. City of Stillwater*, No. 81-1948 (10th Cir. April 28, 1982); *Transok Pipeline Co. v. Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *United States v. Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940).

United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970), does not contradict the holding in *Nicodemus*. In 10.69 Acres we analogized sections 323 and 357 to comparable provisions in Title 23 and concluded that Congress intended to protect *tribal* lands, and not alloted lands, from the condemnation procedures set forth in 23 U.S.C. § 107(a). 425 F.2d at 319-20.[6] The Tenth Circuit's reasoning in *Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976), likewise does not aid the allottees' case. *Plains Electric* is inapposite to a construction of section 357 because it involved a statute providing for the condemnation of communally owned Indian land, not land allotted in severalty as provided for in section 357. *See Yellowfish*, slip op. at 6-8.

The allottees contend finally that California jurisdiction and venue provisions, requiring that suits in eminent domain shall be commenced in California superior court, had "disabled" the Company from bringing this action in federal court. This contention is without merit. Condemnation proceedings pursuant to 25 U.S.C § 357 must be brought in federal court. *Minnesota v. United States*, 305 U.S. 382, 389 (1939). The state through its own jurisdictional provisions cannot strip a federal court of jurisdiction that Congress has conferred to it over suits involving state-created rights. *See Markham v. City of Newport News*, 292 F.2d 711, 713 (4th Cir. 1961); *cf. Oklahoma Gas & Electric Co. v. United States*, 609 F.2d 1365, 1366 n.1 (10th Cir. 1979) (state does not by virtue of section 357 acquire the right to use state procedure or laws in condemnation suits under

[6] Moreover, we are bound to the holding in *Nicodemus* until such time as an en banc panel of this Court overrules it. *Upton v. Commissioner*, 283 F.2d 716, 723 (9th Cir. 1960), *cert. denied*, 366 U.S. 911 (1961).

that section). Moreover, the Federal Rules of Civil Procedure explicitly provide that the Federal Rules, and not state venue provisions, are to apply in actions involving the exercise of the power of eminent domain under state law. Fed. R. Civ. P. 71A(a), (k).

The judgment of the District Court is

AFFIRMED.

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOTE:

Apparently the Court of Appeals has not prepared a separate document as its judgment in this case. However, it did send to petitioner's counsel of record, along with a copy of its opinion which was filed on August 26, 1982, a document entitled "Notice of Entry of Judgment" which states that "Judgment was entered in this case as of the file stamp date on the attached decision of the court."

If the petition is granted, or if the Court should so desire, counsel for petitioner will obtain such a separate document embodying the judgment of the Court of Appeals, if such a separate document exists or can be prepared.

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No. 82-873

IN THE

Supreme Court of the United States

October Term, 1982

STEVEN ALLEN RICE; ANITA VIVIAN MILLER; CHERYL SAUBEL MIRANDA; ELLEN RICE WARD; BOBBIE RAY PRECKWINKLE; and LAVERNE SAUBEL NELSON,

Petitioners,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation; UNITED STATES OF AMERICA; 33.49 ACRES OF LAND IN THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA; *et al.*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Parties.

The parties to this proceeding are the six Indian allottees (Steven Allen Rice, Anita Vivian Miller, Cheryl Saubel Miranda, Ellen Rice Ward, Bobbie Ray Preckwinkle, and Laverne Saubel Nelson); the Southern California Edison Company (a corporation); the United States; approximately 33.49 acres of land located in the County of Riverside, State of California; Goodyear Service Stores; John H. Wingate, Jr.; Timothy J. White; John R. Stotts, Jr.; Vernon H. Halbrook, d/b/a Wingate Air Conditioning Service; and unknown others. In addition, the following are the subsidiaries and affiliates of Respondent Southern California Edison Company:

Associated Southern Investment Company
Bear Creek Uranium Company
Calabasas Communications Co.
Calabasas Park Co.
Calabasas Park Co., Inc.*
California Electric Power Company*
Electric Systems Company
Energy Services, Inc.
Mono Green Mountain Company
Mono Power Company
Mono Power Company (Bolivia)*
Mono Power Company (Italy)*
Mono Power Company (Malaysia)*
Mono Power Company (Nicaragua)*
Mono Power Company (Papua, New Guinea)*
Mono Power Company (Peru)*
Palo Verde Uranium Venture*
Rocky Mountain Energy Company — Mono Power Company — Halliburton Company Uranium Partnership
SCE Capital Company
Southern California Edison Finance Company N.V.
Southern Surplus Realty Co.

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*Inactive.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

Respondent SOUTHERN CALIFORNIA EDISON COMPANY ("Edison") generally agrees with Petitioners' Statement of the Case insofar as it summarizes the proceedings to date and the legal arguments raised by Petitioners. However, Petitioners' statement includes certain comments which need clarification.

As stated by Petitioners, this case involves an action in eminent domain brought by Edison to acquire a right-of-way over certain lands allotted to by Petitioners. At page 11 of their Brief, Petitioners make certain statements that

the question involved in this case is whether a party possessing the power of eminent domain may be able to take allotted lands "more or less at will" and whether such a party may take allotments "essentially for the asking . . . ." Statements such as these seriously mischaracterize the condemnation process, in which it is the obligation of the Federal District Court to insure that the parties whose property is being acquired are afforded their constitutionally guaranteed safeguards. The very nature of the condemnation process is that land may not be acquired unless it is necessary for a public use, and, if it is, the property owners that they receive just compensation. Petitioners themselves note on page 10 of their Brief that the money paid to them was "based on a stipulation regarding just compensation . . ." pursuant to which the District Court entered its judgment. The parties also stipulated that the subject property was being acquired for a public purpose. Having so stipulated, it would appear inconsistent for the Petitioners to now assert that their property is being taken "essentially for the asking . . . ."

REASONS FOR DENYING THE PETITION.

I.

The Subject Statute Is Clear and There Are No Significant Questions of Interpretation Involved.

25 U.S.C. §357 provides that allotted lands "may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned . . . ." However, the Petitioners assert that the fact that 25 U.S.C. §§323-4 provide a means of acquiring allotted lands through negotiation and consent means that the process afforded under Section 357 has been repealed. What this argument fails to consider is the fact that parties are always free to negotiate the sale of property, but where one of the parties has the power of eminent domain it may acquire such property by condemnation if an attempt at negotiation fails.

The fact that Congress has provided a procedure whereby property may be acquired by consensual means cannot logically be interpreted to mean that Congress has repealed by implication a statute providing for the acquisition of land for a public use by means of the exercise of the power of eminent domain. As noted by Petitioners at page 11 of their Brief, both the Ninth and Tenth Circuits (which include much of the Western United States, where these questions are most likely to arise) have resolved these questions in favor of the party seeking to exercise the power of eminent domain. Therefore, there appears to be no conflict among the circuits which have addressed this question.

In *United States v. Clarke*, 445 U.S. 253, 63 L. Ed. 2d 373, 100 S.Ct. 1127 (1980), this Court considered the question of whether 25 U.S.C. §357 authorizes a taking by mere occupation of the property, as opposed to filing a formal condemnation action, and determined that it did not. How-

ever, in reaching this conclusion, the Court noted that "this is a case in which the meaning of a statute may be determined by the admittedly old fashioned but nonetheless still entirely appropriate 'plain meaning' canon of statutory construction." 445 U.S. 253, 254. The "plain meaning" of Section 357 is clear — allotted land is subject to condemnation, just like other privately held land.

In *Clarke*, it was determined that the agencies involved had not acquired title because they had *not* brought an action in eminent domain. This Court stated that "we hold that only in such a formal judicial proceeding may lands such as this be acquired . . . ." *Id.* In the subject case, such an action was brought in accordance with 42 U.S.C. §357.

II.

It Is Clear That Land Allotted in Severalty Is Not Devoted to a Public Purpose.

The Petitioners correctly argue that under California law property which is devoted to a public purpose may be condemned only if the complaint alleges that the intended use is a more necessary public use, or at least not incompatible with the existing public use. However, for purposes of the exercise of the power of eminent domain, allotted land is not deemed to be devoted to a public use. To reach this conclusion, it is not necessary to look any farther than the language of 25 U.S.C. §357 itself. This section allows condemnation of allotted lands "for *any* public purpose" (emphasis added). Although such land might be considered to be devoted to a public use for other purposes, the above language makes it clear that it was not to be so deemed for purposes of condemnation. The fact that Congress authorized condemnation for *any* public purpose clearly demonstrates that it did not consider such land — which is held

by the individual allottee in virtual fee ownership — to be devoted to a public purpose.

The notion that land allotted in severalty is devoted to a private, rather than public, use is wholly consistent with the nature of the ownership. In *United States v. Minnesota*, 113 F. 2d 770 (8th Cir. 1940), the Court described the nature of the title held by an allottee:

> "The land involved, being allotted in severalty, is no longer a part of the reservation, nor is it tribal land. The virtual fee is in the allottee, with certain restrictions on the right of alienation." 113 F. 2d 770, 773.

Thus, under 25 U.S.C. §357, Congress mandated that allotted land is subject to the power of eminent domain to the same extent that other privately held land is. To hold that allotted land is devoted to a public purpose and therefore not subject to condemnation would be to negate the obvious intent of Congress expressed in Section 357.

III.

California's Venue Statute Has Not Disabled Respondent From Bringing an Action Under 25 U.S.C. §357.

Petitioners correctly state that all actions brought under 25 U.S.C. §357 must be filed in Federal District Court, which is where this case was brought. However, Petitioners erroneously assert that because California law provides for eminent domain actions to be brought in Superior Court, the power conferred by Section 357 does not exist in the State of California. This argument implicitly assumes that the grant of the power of eminent domain with respect to Section 357 is a grant by the state; rather, the grant is from the Federal Government but merely made with reference to state law. Absent Congressional authorization, the State of California could not authorize the exercise of the power of eminent domain over the subject property; therefore, the

grant of authority must be from the Federal Government, so that Federal directives with respect to venue and jurisdiction must be followed and cannot be altered by the State. Similarly, the power cannot be diminished or negated by a State statute pertaining to venue.

Conclusion.

For the reasons stated herein, Respondent Edison urges the Court to deny the petition on file in this action.

Respectfully submitted,

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OCTOBER TERM, 1982

STEVEN ALLEN RICE, ET AL., PETITIONERS

v.

SOUTHERN CALIFORNIA EDISON COMPANY AND THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 25 U.S.C. 357 and the Rights-of-Way-Act of 1948, 25 U.S.C. 323 *et seq.*, provide alternative means of acquiring allotted Indian lands.

2. Whether Southern California Edison Company was required to comply with Sections 1240.510 and 1240.610 of the California Code of Civil Procedure by demonstrating that the company's proposed use of allotted Indian lands would not unreasonably interfere with or impair the use to which the land is presently appropriated and is "a more necessary public use" than the present use.

3. Whether Section 1250.010 of the California Code of Civil Procedure, which requires that all eminent domain actions be brought in the state superior courts, strips the federal courts of jurisdiction under 25 U.S.C. 357.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-38) is reported at 685 F.2d 354. The memorandum decision and order of the district court (Pet. App. 20-31) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1982. The petition for a writ of certiorari was filed on November 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Section 3 of the Indian Appropriations Act of 1901, 25 U.S.C. 357, the Rights-of-Way Act of 1948, 25 U.S.C. 323 and 324, and Cal. Civ. Proc. Code §§ 1240.510, 1240.610 and 1250.010 (West 1982), are set out at Pet. 7-9.

STATEMENT

1. On September 25, 1979, respondent, the Southern California Edison Company ("SCE"), a California public utility corporation, filed a complaint in the United States District Court for the Central District of California seeking to condemn a right-of-way to install electrical transmission lines across certain parcels of land within the Agua Caliente Indian Reservation to the east of Palm Springs, California. The affected lands had been allotted to petitioners (the Indian allottees).[1] SCE alleged jurisdiction under 25 U.S.C. 357. The United States, as trustee for the Indian allottees, was named a defendant.

The Indian allottees filed an answer raising the following defenses: (1) condemnation of rights-of-way is not available to SCE under 25 U.S.C. 357 but only pursuant to 25 U.S.C. 323 and 324;[2] (2) SCE's complaint failed to state a claim upon which relief could be granted because it failed to comply with Sections 1240.510 and 1240.610 of the California Code of Civil Procedure;[3] and (3) California had

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[1]The allottees are members of the Agua Caliente Band of Cahuilla Indians. The allotments were authorized by the Act of Mar. 2, 1917, ch. 146, 39 Stat. 969, 976, and the Agua Caliente Equalization Act of 1959, 25 U.S.C. 951 *et seq.* The allotments were made in 1961 by the issuance of patents by the United States in which the government declared that it would hold the parcels of land in trust for the allottees for at least 25 years from the date of issuance.

[2]25 U.S.C. 324 requires that no grant of a right-of-way over or across any lands belonging to a tribe shall be made without the consent of the proper tribal officials. That statutory provision further provides that rights-of-way over and across allotted lands of individual Indians may be granted without the consent of the individual Indian owners in four situations, none of which is relevant here.

[3]Sections 1240.510 and 1240.610 of the California Code of Civil Procedure require that a condemnor demonstrate that: (1) his proposed use of the subject lands will not unreasonably interfere with or impair any other public use to which the land is already appropriated, and (2) his proposed use is a more necessary public use than the use to which the property is presently appropriated.

disabled itself, and others acting under its authority, from taking advantage of 25 U.S.C. 357 because California Code of Civil Procedure Section 1250.010 requires that all condemnation actions be brought in state superior court.

The district court rejected each of the Indian allottees' claims and entered partial summary judgment for SCE on September 10, 1980 (Pet. App. 20-31). The district court, following the Ninth Circuit's decision in *Nicodemus* v. *Washington Water Power Co.*, 264 F.2d 614 (1959), held that 25 U.S.C. 357 authorized condemnation of rights-of-way over allotments. The court also determined that Sections 1240.510 and 1240.610 of the California Code of Civil Procedure were inapplicable because the subject lands were not presently appropriated for a public use; the allotments were for the benefit of individual Indians, rather than for the general public. The court of appeals affirmed (Pet. App. 32-38).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner's principal argument (Pet. 15) is that rights-of-way across allotted Indian lands are now governed by the Rights-of-Way Act of 1948 ("1948 Act"), 25 U.S.C. 323 *et seq.*, and that 25 U.S.C. 357, upon which SCE relied, remains applicable only to non-right-of-way situations, such as the condemnation of an entire interest. Alternatively, petitioners maintain that the 1948 Act repealed 25 U.S.C. 357. These arguments are without merit.

The 1948 Act and 25 U.S.C. 357 form a unified statutory scheme for acquiring rights-of-way over allotted Indian land. A state-authorized condemnor may proceed under either statute to obtain a right-of-way over allotted lands. The potential condemnor may apply to the Secretary of the

Interior for a right-of-way under the 1948 Act, provided the consent of the allottees is obtained,[4] or he may proceed under 25 U.S.C. 357 to condemn the right-of-way. Since the 1948 Act authorizes the Secretary to grant only rights-of-way, a condemnor seeking an interest greater than this type of partial estate in an allotted tract must proceed under 25 U.S.C. 357.

The courts of appeals have uniformly held, as the Ninth Circuit did here, that 25 U.S.C. 357 and the 1948 Act provide alternative methods for acquiring rights-of-way through allotted Indian lands. *United States* v. *Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus* v. *Washington Water Power Co., supra*, 264 F.2d at 617-618; *Yellowfish* v. *City of Stillwater*, 691 F.2d 926, 929-930 (10th Cir. 1982);[5] *Transok Pipeline Co.* v. *Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977), cert. denied, 435 U.S. 1006 (1978). The single contrary decision by the district court in Nebraska (Pet. 11-12), presently on appeal to the Eighth Circuit and presumptively subject to reversal in light of that court's ruling in *Minnesota, supra*, does not create a "cloud," as petitioners assert (Pet. 15). Although this Court has never decided the issue, that does not of course require an exercise of certiorari jurisdiction in the absence of a conflict among the courts of appeals.

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[4]There are four exceptions to this consent requirement. See 25 U.S.C. 324.

[5]As the Tenth Circuit Court of Appeals noted in *Yellowfish, supra*, 691 F.2d at 930, 25 U.S.C. 357 is still in force. The court found it persuasive that in 1976 Congress extended the operation of Section 357 and reemphasized the applicability of 25 U.S.C. 323-328 to the Pueblo Indians of New Mexico. See Act of Sept. 17, 1976, Pub. L. No. 94-416, Section 3, 90 Stat. 1275; H.R. Rep. No. 94-800, 94th Cong., 2d Sess. 3 (1976). The court of appeals in the instant case likewise so held (Pet. App. 36 n.4).

Petitioners stress (Pet. 13-14) that Congress' establishment of a new policy for Indian lands in the Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, and the 1948 Act, repudiated the allotment policies upon which 25 U.S.C. 357 was predicated. But they overstate the change in policy in contending (Pet. 14) that Congress fashioned an inflexible rule that always "prevent[s] the alienation or transfer of allotted lands without the consent of the Indian landowners."

The fact remains that prior to 1934 thousands of allotments had been approved and the IRA did not eviscerate these allotments.[6] Section 357 was, and still is, a necessary tool for accommodating the requirements of state and local governments to the remaining allotments. Section 357 is needed today, as it was in the early years of this century, to enable rights-of-way to be acquired for public purposes. *Yellowfish* v. *City of Stillwater, supra,* 691 F.2d at 930.

2. Petitioners contend (Pet. 16) that the decision of the court of appeals frustrates congressional intent by permitting allotted lands to be treated as if they served no public purpose. Essentially, they argue that because 25 U.S.C. 357 expressly provides that allotted lands may be condemned for any public purpose "under the laws of the State or Territory where located," SCE was required to comply with Sections 1240.510 and 1240.610 of the California Code of Civil Procedure by demonstrating that the company's proposed use of the condemned lands will "not unreasonably interfere with or impair," and is more necessary than, the use to which the property is presently appropriated. The court of appeals held (Pet. App. 34-35) that these lands are

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[6]Indeed, petitioners admit (Pet. 9) their allotments are based in part on allotment provisions enacted by Congress long after the Indian Reorganization Act of 1934. See Agua Caliente Equalization Act of 1959, 25 U.S.C. 951 *et seq.*

not appropriated to public use and, therefore, the pleading requirements under California eminent domain law are inapplicable.

Lands allotted in severalty, as here, are no longer tribal lands. *United States* v. *Oklahoma Gas Co.*, 318 U.S. 206, 214-215 (1943); *United States* v. *Bowling*, 256 U.S. 484, 486-487 (1921); *United States* v. *Oklahoma Gas & Electric Co.*, 127 F.2d 349, 353-354 (10th Cir. 1942); *United States* v. *Minnesota, supra*, 113 F.2d at 773. Thus, the court of appeals correctly determined that since Congress has chosen to place Indian allottees in the same situation as those who own land privately for their sole use and benefit, the potential for a conflict in public uses that arises when a public entity attempts to condemn land already in use for a public purpose is not present here.[7]

3. While petitioners concede (Pet. 17) that "all actions under 25 U.S.C. § 357 *must* occur in federal district court, exclusive of *any* state court," they, nevertheless contend (Pet. 18) that because Section 1250.010 of the California Code of Civil Procedure provides that all eminent domain actions must be brought in the state superior courts, the condemnation rights conferred by 25 U.S.C. 357 are not

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[7]When Congress consented to state condemnation of allotted Indian lands "for any public purpose," 25 U.S.C. 357, it clearly indicated that it did not consider allotted land to be property already appropriated to a potentially conflicting public use. In addition, neither the California legislature nor its courts have remotely suggested that allotted Indian lands could be characterized as lands in public use. California has defined " 'property appropriated to public use' " as "property * * * in use for a public purpose." Cal. Civ. Proc. Code § 1235.180 (West 1982). The California Supreme Court has construed "public use" as " 'a use which concerns the whole community.' " *City of Oakland* v. *Oakland Raiders*, 31 Cal.3d 656, 665, 646 P.2d 835, 841, 183 Cal. Rptr. 673, 679 (1982), quoting *Bauer* v. *County of Ventura*, 45 Cal.2d 276, 284, 289 P.2d 1, 6 (1955).

available to California or to any entity authorized by that state.[8] Petitioners' contention fails to recognize that 25 U.S.C. 357 is a grant of condemnation right from Congress, not from the State of California. Furthermore, in *Minnesota* v. *United States*, 305 U.S. 382, 389 (1939), this Court definitively resolved this question when it stated (emphasis added; footnote omitted):

> Minnesota contends that Congress authorized suit in a court of the state by providing in the second paragraph of § 3 of the Act of March 3, 1901, quoted above, for "condemnation of" lands allotted in severalty to Indians "in the same manner as land owned in fee." But the paragraph contains no permission to sue in the court of a state. It merely authorizes condemnation for "any public purpose under the laws of the State or Territory where located." *There are persuasive reasons why that statute should not be construed as authorizing suit in a state court. It relates to Indian lands under trust allotments — a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts.*

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[8]Petitioners also assert (Pet. 18) that Rule 71A(k), Fed. R. Civ. P., and the Rules Enabling Act, 28 U.S.C. 2072, when read together with California statutes, somehow require that this condemnation be commenced in state superior court. This is clearly unfounded. Rule 71A(k) merely provides that, where the state power of eminent domain is invoked in a federal court, state procedural law must give way to the Federal Rules of Civil Procedure, except that state laws requiring jury trials "of any issue" or trials by commission or by jury "of the issue of compensation" shall govern. See also Rules 1 and 71A(a), Fed. R. Civ. P. Nothing in Rule 71A or in 28 U.S.C. 2072 incorporates the California venue statute providing that condemnations be brought in state superior court.

See also *Nicodemus* v. *Washington Water Power Co., supra,* 264 F.2d at 615. Thus, as the court of appeals correctly determined (Pet. App. 37-38), California cannot strip a federal court of its congressionally granted jurisdiction over suits involving state-created rights. See *Markham* v. *City of Newport News,* 292 F.2d 711, 713 (4th Cir. 1961); cf. *Oklahoma Gas & Electric Co.* v. *United States,* 609 F.2d 1365, 1366 n.2 (10th Cir. 1979) (under 25 U.S.C. 357 state does not acquire the right to utilize state procedures or to apply state laws in condemnation suits). Federal law governs unless Congress chooses to make state law applicable. *United States* v. *93.970 Acres,* 360 U.S. 328, 332-333 (1959). Here, Congress did not so choose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1983

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